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No. 84-1675

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD.,
ALUMINUM COMPANY OF CANADA, LIMITED and
EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN M. TORIELLO
Counsel for Respondent
Aluminum Company of Canada, Limited
One State Street Plaza
New York, New York 10004
(212) 344-6800

DAVID P. H. WATSON
Haight, Gardner, Poor & Havens
Of Counsel

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84-1675 - Brf. in Opp.

STATEMENT OF RESPONDENT ALUMINUM COMPANY OF CANADA, LIMITED PURSUANT TO RULE 28.1 OF THE SUPREME COURT RULES

Respondent Aluminum Company of Canada, Limited, is a wholly owned subsidiary of Alcan Aluminium Limited.

The following are subsidiaries (excluding wholly owned subsidiaries) of respondent Aluminum Company of Canada, Limited:

Alcan-Price Extrusions Limited
Alpac Aluminium Inc.
Jamalcan (Joint Venture Association)
Toyo Aluminium K.K.

The following are subsidiaries of Alcan Aluminium Limited and affiliates of respondent Aluminum Company of Canada, Limited:

Camea S.A.
Alcan Aluminio America Latina Ltda.
Saguenay Shipping Limited
Alcan Pacific Limited
Aluminio Alcan de Colombia S.A.
Ghana Aluminium Products Limited
Compagnie des Bauxites Guinee
Alcan Aluminium (Asia) Limited
Indian Aluminium Company, Limited
Alcan Ivoire S.A.
Nippon Light Metal Company
Toyo Aluminium K.K.
Aluminium Company of Malaysia Berhad
Hunter Douglas N.V.
Alcan New Zealand Limited
Alcan Aluminium of Nigeria Limited
Alcan Thai Company Limited
Alcan Adminco Inc.
Alcan Aluminio (America Latina) Inc.

Alcan Aluminium Africa and Middle East Ltd.
Alcan Aluminium Products Ltd.
Alcan Basic Raw Materials Ltd.
Alcan East Asia Ltd.
Alcan Europe N.V.
Alcan Fiduciaries Ltd.
Alcan Finances Ltd.
Alcan Finances (Bda) Ltd.
Alcan Finances Overseas N.V.
Alcan Finances (U.K.)
Alcan International Ltd.
Alcan Shipping Services Ltd.
Alcan South Pacific Ltd.
Aluminio de Venezuala C.A.
Aluminium Enterprises, Inc.
Halco (Mining) Inc.
Maison Alcan Inc. Canada
Southeast Asia Bauxites Ltd. Canada
Unidare Ltd.

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts correctly interpret section 302 of the Civil Practice Law and Rules of New York as not providing personal jurisdiction over a nonresident defendant that did not invoke the benefits of New York law?

2. If the lower courts erred in the interpretation of New York law, does the Due Process Clause protect a nonresident defendant from suit in a jurisdiction in which it has not invoked the benefits of that jurisdiction's law?

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PAKISTAN NATIONAL SHIPPING CORP.,

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—v.—

MOUNT ROYAL MARINE REPAIRS, LTD.,
ALUMINUM COMPANY OF CANADA, LIMITED and
EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statutes and Rules Involved

The Civil Practice Law and Rules of New York provides in pertinent part as follows:

§ 302(a) Acts which are the basis of Jurisdiction

As to a cause of action arising from any of the acts enumerated in this section, the court may exercise personal jurisdiction over any nondomiciliary, . . ., who in person or through an agent:

* * *

3. Commits a tortious act without the state causing injury to person or property within the state except as to a cause of action for defamation of character arising from

> the act, if he . . ., (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

Federal Rules of Civil Procedure 4(e) provides in pertinent part:

> Whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found in the state . . ., service may be made under the circumstances and in the manner prescribed by the statute . . . . Whenever a statute . . . of the state in which the district court is held provides (1) for service of a summons upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed by the statute . . . .

Statement of the Case

This is an action to recover damages for personal injuries allegedly sustained and wrongful death allegedly incurred as a result of a fall by Thomas Mascuzzio on July 30, 1981, while he was working as a longshoreman in hatch #2 aboard the vessel, m/s KAPTAI, in Brooklyn, New York. The defendant and third party plaintiff apparently was the owner of the vessel. The vessel, more than two weeks prior to its call in New York, had called in Canadian ports, including Montreal and Port Alfred (A. 55-59).[1]

At Port Alfred, the vessel loaded a cargo of aluminum rods that had been sold F.A.S. Port Alfred, for delivery in Karachi, Pakistan (A. 48, A. 60). The stevedoring work was performed in hatches 3 and 4 of the vessel (A. 60). In addition to the regular stevedoring services for the aluminum rods, the

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1 Numerical references in parentheticals refer to pages of the Joint Appendix filed with the Court of Appeals for the Second Circuit.

Aluminum Company of Canada (Aluminum Company), at the special request of the defendant and third party plaintiff's Montreal agent, apparently supplied a gang of carpenters to secure certain cargo which had previously been stowed in various hatches of the ship. The Aluminum Company is not in the regular business of supplying such services for cargo loaded at other ports, but supplied the necessary labor in this case as an accommodation to the Pakistan National Shipping Corp. The securing work was completed in Port Alfred, Quebec. The Aluminum Company neither shipped nor purchased any of this previously stowed cargo (A. 49). The employees performing the stevedoring and lashing work reside in the vicinity of Port Alfred and the relevant work records are kept at Port Alfred (A. 49).

A review of the vessel's deck log revealed that prior to the vessel's call in Brooklyn, New York on July 30, 1981 the vessel had called in Philadelphia and Baltimore where additional cargo work was performed in various hatches (A. 40). The accident underlying this litigation is claimed to have occurred in the #2 hatch of the vessel when certain hatch boards fell under the decedent's weight (A. 51).

The moving papers of the Aluminum Company demonstrated that the company is a foreign corporation with its principal place of business in Montreal, Quebec. The company did not have offices or inventory in New York, had no directors, officers, employees or agents resident or assigned to duty within New York, did not advertise in New York, did not have warehouses, dealers, distributors or real property in New York, did not distribute, finance or service goods or services in New York, and had not sought qualification or registration to do business in New York (A. 48).

The opposition papers consisted solely of an attorney's hearsay affidavit and, with regard to the Aluminum Company, a purported loading sheet and stowage plan. Neither of these documents showed any work performed by the Aluminum Company in hatch #2 of the vessel where this accident is

alleged to have occurred. Not surprisingly, defendant and third party plaintiff does not offer a citation to the record for its assertion at page 4 of the Petition for Certiorari that the Aluminum Company had last placed the hatch boards in the forward end of the #2 hatch upper 'tween deck. Similarly, the defendant and third party plaintiff did not submit any evidence that the Aluminum Company expected or should reasonably have expected that its activities in Port Alfred would have consequences in New York. Indeed, the cargo stowed by the Aluminum Company was actually destined for Karachi, Pakistan, and the Aluminum Company did not ship or purchase any of the previously stowed cargo for which it provided a lashing crew (A. 48-49, A. 60). In short there was nothing to demonstrate that the Aluminum Company had notice that the vessel would call in New York, or even more to the point, that it purposefully availed itself of the privilege of conducting activities within New York.

Reasons for Denying the Petition

Petitioner urges certiorari on the grounds that there is complete discord in the lower federal courts concerning the appropriate standard to apply in judging personal jurisdiction in federal question cases. The circuit courts have had no difficulty dealing with this issue. Where a special federal statute permits assertion of personal jurisdiction or use of nationwide service, such as Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, the courts have followed the provisions of Rule 4(e), and judged the constitutionality of the assertion of personal jurisdiction under the Fifth Amendment. Where, however, there is no special federal statute, the courts have recognized that personal jurisdiction, under F.R.Civ.P. 4(e), is drawn from the jurisdictional statutes of the state within which the district court is sitting. As provided in Rule 4(e), the assertion of jurisdiction is permitted only under "the circumstances and in the manner prescribed in the statute or rule." The state statute is then reviewed to ensure, as directed

by the Court, that there are constitutionally recognized contacts between the defendant, litigation, and forum.

Petitioner also urges certiorari on the grounds that the New York Long Arm Statute has been found unconstitutional and that such a finding is disruptive. The district court did not find the New York Long Arm Statute to be unconstitutional. The petitioner simply failed to prove the necessary predicates under that statute. In short, the decision of this case does not involve constitutional issues, but is limited to an interpretation of the New York jurisdictional statute.

POINT I

THE JURISDICTIONAL ISSUE IN THIS CASE ARISES UNDER NEW YORK C.P.L.R. § 302(a) (3) (ii) AND THERE IS THEREFORE NO QUESTION OF A FEDERAL STANDARD OF JURISDICTION.

Petitioner claims that the indemnity sought in the third party complaint is within the Admiralty Jurisdiction and therefore it is entitled to a federal or nationwide standard for service of process. Petitioner does not explain the relevance of such service of process to this matter. The respondents are incorporated in the Province of Quebec, and contacts with the United States in addition to New York contacts have not been shown.[2]

Even assuming relevance, petitioner's argument is flawed because it confuses subject matter jurisdiction of the district court with personal jurisdiction of that court. Admiralty claims of course provide subject matter jurisdiction under Article III, section 2 of the Constitution. *E.g. Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249, 272-73 (1972). The maritime nature of the claim, however, does not by itself

2 Here, as in *Aquascutum of London, Inc.* v. *S.S. American Champion,* 426 F.2d 205, 211 n.4 (2d Cir. 1970), the party seeking jurisdiction does not show that a federal standard would be more easily met. Consequently, the discussion of state versus federal standards raised by the petitioner is largely academic.

provide a basis for the assertion of personal jurisdiction by the district court.

Relying to a great extent on the provisions of F.R.Civ.P. 4(e),[3] the circuit courts that have directly considered the issue have held that assertion of personal jurisdiction is bounded by the limits of state jurisdiction in those admiralty cases that do not involve federal statutes or rules permitting assertion of personal jurisdiction. *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983); *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981); *see Engineering Equipment Co.* v. *S.S. Selene*, 446 F. Supp. 706, 709 n.11 (S.D.N.Y. 1978). In the Ninth Circuit the same rule has been applied as self-evident. *E.g. Hedrick* v. *Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1357-58 (9th Cir. 1983).

The Sixth Circuit in *Handley* v. *Indiana & Michigan Electric Co.*, 732 F.2d 1265 (6th Cir. 1983) found a variation on the Fourteenth Amendment analysis to be appropriate in federal question cases in which state jurisdictional statutes are invoked. The court did measure jurisdiction by the contacts between the defendant and the forum state, but limited its inquiry to what it perceived as only one of two purposes served by the Fourteenth Amendment, *viz.* protecting defendants from distant or inconvenient litigation. The other perceived purpose was to prevent encroachment by the states as coequal sovereigns. These two purposes were identified by this Court in *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 291-92 (1980). As later decisions of this Court have made clear, the Sixth Circuit in fact applied the usual Fourteenth Amendment standard and focused upon the actual purpose of the due process clause. The Fourteenth Amendment is not based upon

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3 *Arrowsmith* v. *U.P.I.*, 320 F.2d 219 (2d Cir. 1963), cited by petitioners as withholding opinion on the applicability of a federal standard in federal question cases, was decided before the amendment of F.R.Civ.P. 4(e) in 1963. That amendment adopted the second sentence of the subsection and the specific limitation on the use of state jurisdictional statutes to the circumstances permitted under state law.

federalism concerns; it protects the interests of individual liberty.

In *Insurance Corp.* v. *Compagnie des Bauxites,* 456 U.S. 694, 702 (1982), the Court referred specifically to this passage in *Woodson* and stated that the requirement of personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." In footnote 10 appended to this text, the Court quoted the federalism discussion in *Woodson,* explaining that restrictions on state sovereign power are ultimately based upon the individual liberty interest recognized in the Due Process Clause.

> That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement. . . .

Id. at 702 n.10. *Accord Keeton* v. *Hustler Magazine, Inc.,* ____ U.S. ____, 52 U.S.L.W. 4346, 4347 (Sup. Ct. March 20, 1984); *id.* at 4349 (Brennan, J., concurring).

Although not plainly stated, the Sixth Circuit reached the correct result. That Circuit's standard is, therefore, in accord with the standards applied by the Third, Fifth and Ninth Circuits.[4]

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4 The petitioners citation of *Leasco Data Processing Equipm. Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972) is not indicative of a conflict since that decision involved the specially enacted jurisdictional provisions of the federal securities laws. Indeed, the existence of such explicit federal jurisdictional statutes suggests that a federal standard is not to be applied unless Congress explicitly enacts a federal jurisdictional statute.

POINT II

SECTION 302 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES WAS NOT DECLARED UNCONSTITUTIONAL BY THE DISTRICT COURT. PETITIONER DID NOT MEET THE REQUIREMENTS OF THIS STATUTE.

Petitioner asserts, without citation to the opinion, that the district court found the New York long-arm statute unconstitutional. District Judge Motley did not so hold. Petitioner simply failed to prove the predicate acts permitting assertion of jurisdiction. At page 3 of petitioner's brief in the Second Circuit, it is conceded that the basis of personal jurisdiction is CPLR 302(a) (3) (ii).

This provision requires:

1. a tort committed outside the state causing injury within the state;

2. substantial revenue from interstate or international commerce;

3. a reasonable expectation of consequences in New York.

The third requirement has been interpreted by the New York courts as including a purposeful availment by the defendant of the privilege of conducting activities within New York. *Martinez* v. *American Standard,* 91 App. Div.2d 652, 653-54 (2d Dept. 1982), *aff'd on the opinion of the Appellate Division,* 60 N.Y.2d 874 (1983). The purposeful availment requirement was drawn from this Court's decisions in *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980) and *Hanson* v. *Denckla,* 357 U.S. 235 (1958).

Contrary to the petitioner's unsupported assertions, there was no proof that the Aluminum Company committed an out-of-state tort causing New York injury. There is no evidence

in this record that the Aluminum Company ever acted in the hatch in which the accident occurred.

So too, there is nothing to show that this respondent conducted activities in New York. The Aluminum Company performed its functions in Port Alfred, Quebec, where the ship had traveled to obtain the services. The company was also retained in Montreal, Quebec through the petitioner's local agent. Moreover, there is nothing in the record to support petitioner's argument that this respondent knew the vessel was coming to New York. Without a showing of activities conducted in New York, such knowledge would not, in any event, be enough to permit exercise of jurisdiction. *See Kulko* v. *California Superior Court,* 436 U.S. 84 (1978).

The district and circuit courts have properly interpreted and applied the New York statute. Petitioner has simply not shown that the jurisdictional predicates exist.

CONCLUSION

RESPONDENT RESPECTFULLY SUBMITS THAT A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE DECISION BELOW.

Respectfully submitted,

JOHN M. TORIELLO
Counsel for Respondent
Aluminum Company of Canada, Limited
One State Street Plaza
New York, New York 10004
(212) 344-6800

DAVID P. H. WATSON
Haight, Gardner, Poor & Havens

Of Counsel